

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: December 29, 2003

TO : Curtis A. Wells, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: International Specialty Products, Inc.
Cases 16-CA-23150, 23151, 23152, 23153

177-1673
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These cases were submitted for advice concerning the extent of a Golden State¹ successor's liability, including 1) whether a Golden State successor that has not hired a majority of the predecessor's employees can be required to reinstate the predecessor's discriminatees; and 2) whether the Golden State successor's liability is extinguished by a bankruptcy court's order of a sale of the business free and clear of all encumbrances, including outstanding unfair labor practice charges.

We conclude that a Golden State successor that hired a minority of the predecessor's employees is liable for monetary damages, but cannot be required to reinstate the predecessor's discriminatees. We further conclude, however, that the charges against the Golden State successor should be dismissed, absent withdrawal, because it obtained the business free and clear of all encumbrances, including outstanding unfair labor practice charges.

FACTS

Ameripol Synpol Corporation (ASC) owned and operated a rubber manufacturing plant, where it employed members of five maintenance craft bargaining units and a separate unit of production employees. Each of the six bargaining units was represented by a different labor organization.²

¹ Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973).

² The craft units were represented by Pipefitters Local Union 195, IAM District Lodge 37, IBEW Local 390, Painters Local 1008, and Carpenters Local 502. The production employees were represented by PACE Local 4-228.

In December 2002, ASC filed Chapter 11 bankruptcy proceedings with the U.S. Bankruptcy Court for the District of Delaware. On about January 23, 2003,³ ASC subcontracted out the maintenance craft work and laid off all the maintenance craft unit employees without notifying or bargaining with the Unions.⁴

The Unions filed unfair labor practice charges and, on April 4, the Region filed with the Bankruptcy Court a "Notice of the Pending Unfair Labor Practice Litigation." On June 30, the Region issued a consolidated complaint alleging that ASC violated Section 8(a)(5) by unilaterally changing various terms and conditions of employment. These included contracting out the maintenance craft bargaining unit work, repudiating the contractual grievance-arbitration provisions of the expired collective-bargaining agreements, refusing to process grievances, and refusing to furnish relevant and necessary information.⁵ The Region's requested remedy included rescission of various unilateral changes, backpay, and reinstatement of the laid off employees.

On July 31, International Specialty Products (ISP) purchased ASC's business through the Bankruptcy Court proceedings. The Court Order approving the sale provided for a transfer "free and clear of all mortgages, pledges, security interests, liabilities and claims," including "any outstanding unfair labor practice charges or complaints. . . ."⁶ Neither the Charging Parties nor the Region objected to the terms of the sale. Also on July 31, the Region sent ISP a Golden State letter, notifying it of the pending unfair labor practice charges against ASC.

ISP subsequently reopened the plant and produced the same product, used the same equipment, and supplied the same customers. It also hired former ASC managers and former ASC computer, shipping, office, sales, and production employees. However, ISP hired none of the maintenance craft bargaining unit employees. Instead, ISP contracted out the maintenance craft bargaining unit work to one of the contractors that had performed the work for ASC while the plant was idled.

³ All dates are 2003 unless otherwise indicated.

⁴ ASC did not subcontract the work of the production employees.

⁵ 16-CA-21425. The ULP hearing has been postponed indefinitely for settlement efforts.

⁶ Case No. 02-13682 (KJC).

On October 2 and 3, each of the Charging Parties requested that ISP meet to negotiate a new collective-bargaining agreement. On October 6 and 9, ISP refused to bargain with the Unions.

On October 10, the Charging Parties filed Section 8(a)(5) charges against ISP. In response to those charges, ISP filed a Complaint in Bankruptcy Court for "Injunctive and Declaratory Relief and Other Equitable Relief in Aid of Enforcing Compliance with Sale Order" to enjoin the Region from proceeding on its unfair labor practice charges. A bankruptcy hearing is scheduled for January 7, 2004.

ACTION

We conclude that although ISP would normally have to remedy several of ASC's unfair labor practices as a Golden State successor, complaint should not issue because the Bankruptcy Court transferred the business to ISP "free and clear of all encumbrances," including outstanding unfair labor practice charges.

1. ISP is a Golden State successor

In Golden State Bottling Co.,⁷ the Supreme Court adopted the Board's Perma Vinyl⁸ holding that an employer that acquires a business with knowledge of the predecessor's unfair labor practices, and that continues operating the business "without interruption or substantial change," is liable to remedy the predecessor's Section 8(a)(3) violations.⁹ The Court held that the Board could require the successor to reinstate with backpay an employee illegally discharged by the predecessor.

A Golden State successor may be liable for its predecessor's unlawful conduct even if it is not a successor within the meaning of NLRB v. Burns Security Services;¹⁰

⁷ Golden State Bottling Co. v. NLRB, above, 414 U.S. 168.

⁸ Perma Vinyl Corp., 164 NLRB 968 (1967), enfd. sub nom. United States Pipe and Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968).

⁹ A successor's liability under Golden State also applies to monetary relief for a predecessor's Section 8(a)(5) violations. See St. Mary's Foundry Co., 284 NLRB 221, n.4 (1987), enfd. 860 F.2d 679 (6th Cir. 1988).

¹⁰ 406 U.S. 272 (1972).

i.e., if it did not hire a majority of its predecessor's employees.¹¹ However, where a successor did not hire a majority of its predecessor's employees, its liability is limited to monetary relief, and it is not obligated to reinstate the predecessor's discriminatees or to recognize and bargain with their union.¹²

In this case, ISP meets the Board's tests for liability as a Golden State successor because it acquired the business with knowledge of ASP's unfair labor practices and continued the business without substantial change. However, because ISP did not hire a majority of ASP's workforce, it is not obligated to reinstate the predecessor's discriminatees and its backpay liability ends on the date that ASC ceased operations.

2. The Bankruptcy Court's "free and clear" sale

In International Technical Products,¹³ the Board found that the liability of a successor that purchased the Chapter 11 debtor's business with knowledge of the predecessor's unfair labor practices was not extinguished by a bankruptcy court's order of a sale of assets free and clear of all liens, claims, and encumbrances. Under ITP, a Golden State successor's monetary liability was not extinguished by a bankruptcy court's order approving the free and clear transfer of the business because only the Board is charged with remedying violations of the NLRA. 249 NLRB at 1303. However, there are significant open questions concerning

¹¹ St. Mary's Foundry Co., 284 NLRB at 221 n.4 (a finding that the old employees constitute a majority in the purchaser's work force is unnecessary for the imposition of at least monetary remedies); The Bell Company, 243 NLRB 977, 978 (1979).

¹² See St. Mary's Foundry Co., 284 NLRB at 221 n.4 (Golden State successor that hires minority of predecessor workforce is jointly and severally liable only for backpay. Should the predecessor's bargaining over effects obligate it to actions other than monetary relief, the successor would not be bound); The Bell Company, 243 NLRB at 978-79 (Golden State successor that hires minority of predecessor's workforce is liable for backpay. Board, without comment, drops remedy requiring successor to execute predecessor's collective-bargaining agreement after court of appeals rejects Board's conclusion that successor is alter-ego).

¹³ 249 NLRB 1301 (1980).

ITP. The decision was not appealed and its reasoning has not been revisited by the Board.¹⁴

Moreover, by concluding that a backpay order cannot be extinguished or modified by a bankruptcy court, ITP arguably ignores the long-standing principle that a backpay award has no greater priority in bankruptcy proceedings than any other wage claim.¹⁵ As such, it fails to take into account and reconcile the important competing objectives underlying that different Federal statutory scheme.¹⁶

We conclude that the instant case does not present a favorable vehicle for testing the continued viability of ITP. First, ISP's liability is questionable here since the Bankruptcy Court's Order approving the sale provides for a transfer "free and clear of all mortgages, pledges, security interests, liabilities and claims," including "any outstanding unfair labor practice charges or complaints. . . ." (Emphasis added.) Thus, the Bankruptcy Court specifically discharged the Employer's unfair labor practice liability and neither the Charging Party nor the Region objected to the Court's order. Second, the fact that the instant ULP complaint would seek only backpay makes its

¹⁴ Rather, in subsequent cases, the Board has cited ITP for its more limited teaching regarding the general impact of bankruptcy proceedings upon Board action. See Evans Plumbing Co., 278 NLRB 67, 68 (1986), enfd. in part 810 F.2d 1089 (11th Cir. 1987); Better Building Supply Corp., 283 NLRB 93, 96-97 (1987), enfd. 837 F.2d 377 (9th Cir. 1988).

¹⁵ See e.g. Nathanson v. NLRB, 344 U.S. 25 (1952). See also International Technical Products, 249 NLRB at 1305, Member Penello dissenting ("the majority errs in failing to conform the objectives of the [Act] . . . to the equally important objectives of the Bankruptcy Act and, moreover, ignores the clear instructions of the Supreme Court, in Nathanson v. N.L.R.B., that the Board's backpay orders are not entitled to special status under the Bankruptcy Act").

¹⁶ Indeed, one court has expressly rejected International Technical Products in permitting a sale free and clear of Title VII liability. See In re New England Fish Co., 19 B.R. 323 (Bkrtcy W.D. Wash. 1982), cited with approval in NLRB v. Martin Arsham Sewing Co., 873 F.2d 884, 888 (6th Cir. 1989). See also In re All American of Ashburn, Inc., 56 B.R. 186, 189-90 (Bkrtcy N.D.Ga. 1986), affd. 805 F.2d 1515 (11th Cir. 1986) (a free and clear sale precluded liability of a successor corporation stemming from a products liability claim against the predecessor corporation).

relationship to the Bankruptcy Court ruling particularly troublesome, since the decision over whether one claim should receive preference over other creditors is a matter peculiarly within the province of the Bankruptcy Court. Here, the Bankruptcy Court's decision already disposed of all liens or claims relating to property of the estate, and the ULP complaint would directly undermine that ruling.

Under these circumstances, it would not effectuate the purposes of the Act to issue a complaint. Accordingly, the charges against ISP should be dismissed, absent withdrawal.

B.J.K.